

Editor's Note: This article was the winner of the first prize in the category "student articles" of the 1991 annual Center for Public Resources Awards Program for Excellence and Innovation in Alternative Dispute Resolution.

Making Mediation Mandatory: A Proposed Framework

ANDREAS NELLE*

I. INTRODUCTION

Mediation is a process for resolving disputes as old as disputes themselves. Today, mediation serves increasingly as an alternative to litigation. In a mediation, the parties, "together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement to accommodate their needs."¹ In its original form, mediation is doubly voluntary: it is entered into voluntarily and it produces a result which is solely based on the parties' agreement. However, in recent years there has been an increasing trend towards mandating mediation before a case goes to trial.² Mandating mediation removes the voluntariness of participation but leaves intact the voluntariness of the agreement.³ Pressure to agree to a settlement would be fundamentally incompatible with mediation, because it would eliminate voluntariness as the basis for the result.⁴

The trend towards mandatory mediation has raised issues of both

* J.D., 1988, Munich University (Germany); M.P.A., 1991, Kennedy School of Government (Harvard). This article has benefited greatly from practical experience as a mediator, made possible by the Harvard Mediation Program. Special thanks are due to Frank Sander, Christian Buehring-Uhle and Sarah Gross for their helpful comments on earlier versions of this article.

1. JAY FOLBERG & ALLISON TAYLOR, *MEDIATION* 7 (1984). It is important to distinguish mediation from other techniques of alternative dispute resolution (ADR) such as the summary jury trial (SJT), which is an abbreviated hearing before real jurors who return an advisory verdict. For information about the importance of distinguishing among the different ADR processes, see Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77 (1991); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 40, 44 (1991).

2. See *infra* part II for current areas of mandatory mediation.

3. The process can still be called mediation, as long as the outcome depends entirely on the parties' agreement. The failure to draw a distinction between mandatory process and forced agreement explains the rejection of mandatory mediation by the Supreme Court of Georgia in *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265 (Ga. 1989).

4. *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts*, SPIDR REP., Jan. 5, 1991.

law and policy. The policy issue is whether and where mediation should be made mandatory. The legal issues concern the validity, content and enforcement of provisions mandating mediation. In sum, the problem is to determine where and how to make mediation mandatory.

Mediation can be mandated by statute, court rule, individual court ruling or by a contractual mediation clause.⁵ It has been mandated in areas as diverse as family disputes, medical malpractice suits and producer-distributor disputes. Legislatures, courts and parties mandating mediation for certain controversies must confront two questions: first, whether the controversy is suitable for mediation; and second, whether it is appropriate to *mandate* mediation of the controversy. This Article suggests criteria for answering both questions. It argues that mediation should only be mandated if the type of dispute will be particularly suitable for mediation, and if there are barriers which prevent the parties from attempting mediation voluntarily themselves even though it would be in their interest.

The perspective on mandatory mediation proposed here differs from much of the current discussion on the subject. The starting point of many current analyses is the court system.⁶ Mediation is envisaged as one of the alternatives to trial for controversies that have already become legal disputes, crowding the overburdened courts' dockets. This Article looks at mediation from the perspective of parties who have an ongoing relationship and need a process for resolving controversies. From this perspective, the Article takes a fresh look at the main questions about mandatory mediation: where is it appropriate and how should it be shaped and enforced? The first section of the Article contains an overview of the areas in which mediation is or can be mandated. The second section develops criteria for assessing when it is appropriate to mandate mediation. The third section applies the criteria to the different areas and suggests when mandatory mediation is appropriate as a matter of policy and valid legally, what specific content a duty to mediate entails, and how that duty may be enforced.

5. See *infra* part II.

6. See, e.g., Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990); SPIDR REP., *supra* note 4; G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991).

MAKING MEDIATION MANDATORY

II. CURRENT AREAS OF MANDATORY MEDIATION

Mediation can be mandated by statute, court rule, individual court ruling, or by a contractual mediation clause. This section surveys the areas of law⁷ in which mediation is mandated by one of these schemes.

The main areas in which mediation is currently mandated by statute are⁸ labor⁹ and family¹⁰ disputes, medical malpractice,¹¹ farm mortgage foreclosure,¹² agricultural producer-distributor bargaining,¹³ civil rights disputes,¹⁴ and certain consumer warranty cases.¹⁵

Court rules may require mediation as a prerequisite to filing a suit, either for certain categories of cases (often authorized by special statutes) or for all cases, sometimes below a certain monetary threshold.¹⁶

Individual court rulings sometimes mandate mediation (or some other form of ADR) on the basis of the Federal Rules of Civil Procedure's (FRCP) Rule 16¹⁷ or a more specific state statute.¹⁸

Contracts in different areas may contain mediation clauses. Such clauses are often found in construction contracts, automobile distributorships, partnerships and employment contracts (for example, clauses concerning employee grievances). Contractual mediation clauses mandate mediation when a dispute arises, not unlike a statutory mandate. However, the initial decision to mandate mediation for disagreements is

7. While mandates by law or local rule generally apply to classes or areas of disputes, mandates by individual rulings and clauses mostly apply to individual cases. However, it is still possible to determine the areas or classes of disputes in which most of these individual cases lie.

8. See the extensive list in NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE*, app. B (1989).

9. For collective bargaining mediation, see 29 U.S.C.S. § 173 (Law. Co-op. 1975 & Supp. 1991).

10. See, e.g., CAL. CIV. CODE § 4607 (West Supp. 1990); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1989).

11. See, e.g., ME. REV. STAT. ANN. tit. 24, §§ 2851-59 (West Supp. 1989).

12. MINN. STAT. ANN. § 583.27 (West 1988 & Supp. 1992) (repealed effective July 1, 1993); IOWA CODE ANN. § 654A.6 (West Supp. 1989).

13. ME. REV. STAT. ANN. tit. 5, § 12004 (West Supp. 1989).

14. See generally Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 590 (1987).

15. A mandatory, mediation-like process is authorized by federal statute in 15 U.S.C. § 2310(a) (1988). However, this process only becomes mandatory between seller and consumer if it is approved by the Federal Trade Commission (FTC) and the consumer is notified. Although authorized by statute, this resembles more the contractual mediation clauses discussed below than a statutory requirement.

16. See, e.g., MINN. STAT. ANN. § 484.74 (West 1990 & Supp. 1992).

17. However, a recent decision narrowed Federal Rule of Civil Procedure 16 as a basis for mandatory mediation. See, e.g., *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989) (parties can be "referred" to mediation, but if "either party determines that none of the issues can be resolved by mediation, litigation will proceed according to the schedule set by the trial court").

18. See, e.g., FLA. STAT. ANN. § 44.102 (West Supp. 1990).

not made by the legislature or by the courts, but by the parties themselves. Nonetheless, it makes sense to discuss mediation clauses along with statutory mediation mandated by legislatures or courts because regulators should apply the same criteria parties would apply before agreeing on a mediation clause: does mediation promise more benefits than risks to the parties?

III. PROPOSED CRITERIA FOR MANDATORY MEDIATION

Mediation should only be mandated for those cases in which the potential benefits to the parties from a mediated agreement will outweigh the costs and risks of mandating mediation. The goal of the criteria for determining when mediation should be made mandatory is not only to reduce the number of cases that are unmediated although mediation would be beneficial, but also to reduce the number of cases in which mediation is improperly imposed.

The argument that mandating mediation only obliges the parties to try once and thus is no real imposition is mistaken. Even trying mediation can have substantial cost in terms of time and displacement. More importantly, as a matter of principle, the introduction of any freedom-limiting duty into the legal system needs to be justified. Before mandating mediation, the principle of proportionality requires balancing the possible benefits from mediation against the costs of imposing mediation.¹⁹ Accordingly, mediation should only be mandated if: first, the controversy is suitable for mediation; and second, it is proportional to *mandate* mediation of the controversy.

This section proposes general criteria to answer whether controversies are suitable for mediation and whether it is appropriate to mandate mediation. General criteria are most suitable because legislatures and courts have to rely on general criteria (such as "disputes below a value of \$1000" or "medical malpractice claims") when they mandate mediation in laws or rules. Although a screening process that looks at each case individually can use a more detailed and complex set of criteria to assess the cases, it could still use the following proposed criteria as guidelines. Mediation should only be mandated: (A) for the appropriate types of controversies, and (B) only when power imbalances between the parties are insignificant or can be remedied, and (C) only to overcome certain existing barriers to the use of mediation. These criteria for mandating mediation can be applied to the areas where mediation is or

19. The same principle is expressed in the law of remedies by balancing equities and hardships. See D.B. DOBBS, REMEDIES 52-54 (1973).

MAKING MEDIATION MANDATORY

may be mandatory. As a result, a framework for assessing where and how to mandate mediation emerges.

A. Type of Controversy

In a controversy, the parties' discussion can concentrate primarily on their rights or on their interests.²⁰ To resolve a dispute about rights, a mediation can be "rights-based"²¹ and focus on helping the parties to develop a shared perception of their respective rights or to arrive at a compromise between their differing perceptions of their rights. To resolve a conflict about interests, the mediation can be "interest-based"²² and focus on finding an agreement that accommodates both parties' interests or on arriving at a compromise consisting of concessions which are valued more highly by the receiving party than by the party making them. A mediation can also try to reorient the parties' discussion from rights to interests and then proceed with an "interest-based" approach.²³ In many cases the mediation is about both rights and interests. However, even in most of those hybrid cases one element tends to dominate and lend a focus to the parties' discussion.²⁴

Mediation provides parties with an opportunity to reconcile interests ("problem-solving"),²⁵ an opportunity courts are not designed to supply. Mediation is a process in which "the emphasis is not on who is right or

20. WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED 3-9 (1988). Ury, Brett and Goldberg introduce a third element, power, which will be discussed *infra*, part II.B. The relationship between rights and interests is certainly a complicated one and cannot be fully explored here. For the purpose of understanding disputes, one may think of rights as interests which are protected by law. Because the legal protection has to take the form of a general rule, it has to generalize the underlying interests and cannot embody all the possible interests of each particular case. As a result, rights take on a focused, universal, and explicit nature which distinguishes them from the multiple, shifting, and unique interests present in each particular case. In a given case, a party's rights may only coincide partly with her underlying interests. However, in some cases rights represent the party's interests which are at issue quite well. In these cases, the party may be well advised to focus on her rights instead of (unprotected) interests.

21. *Id.* at 6; McEwen, *supra* note 1, at 78-80, esp. n.17.

22. See URY et al., *supra* note 20, at 6; McEwen, *supra* note 1, at 78, esp. n.17. See also Lon Fuller, *Mediation, It's Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

23. URY et al., *supra* note 20, at 49; McEwen, *supra* note 1, at 86.

24. URY et al., *supra* note 20, at 6. One part of this paper (part III.A) will try to determine which kinds of cases lend themselves to a more interest-based form of mediation.

25. McEwen, *supra* note 1, at 79:

In problem-solving settlement . . . the central goal is not to predict what a court would do. Instead the standard for a good outcome is whether or not it meets the needs and responds to the underlying interests of the parties and, perhaps, appears generally "fair" or "just." . . . Mediation, in particular, has been advocated as a problem-solving process . . .

wrong . . . but rather upon establishing a workable solution that meets the participant's unique needs."²⁶ Mediation assists the parties in creating options for mutual gain that can be the basis of an agreement.²⁷ It is, therefore, particularly well-suited for dealing with interest-centered controversies or for reorienting disputes towards reconciling interests. It can perform this function best if the parties' controversy occurs in the context of an ongoing relationship which provides shared interests in the future. However, interest-based mediation will usually not be productive where the controversy is centered on the retrospective assessment of legal claims arising from an isolated past interaction, such as a traffic accident. If the parties have no future dealings with each other, it is unlikely that shared interests or opportunities for mutually beneficial arrangements arise. The parties' discussion will stay focused on the ex-post assertion of rights.

In rights-centered controversies with little or no opportunities for reconciling interests (for example, claims arising from a traffic accident), rights-based mediation, much more than interest-based mediation, performs an essentially judicial task. Mediation is only beneficial to the parties if it is a better process for discovering and acknowledging their respective rights than adjudication. This assessment in turn depends on the effectiveness with which the judicial system performs its central task of determining rights. In a situation of overburdened courts and scarce public finances, mediation may perform better than the courts. Additionally, mediators may serve the public interest by relieving the courts of some of their burden.

Mandatory rights-based mediation is open to a host of unique objections, however. The most important objection is that courts may be better equipped than mediators to determine parties' rights.²⁸ On an institutional level, mandating rights-based mediation raises the objection that it may result in delaying or avoiding necessary reforms of the court system. This objection cannot be raised for interest-based mediation, because the courts were never meant to protect the kinds of interests involved in interest-based mediation.

While there may still be good reasons for mandating mediation or

26. FOLBERG & TAYLOR, *supra* note 1, at 10.

27. Where the parties have already tried to negotiate an agreement, mediation can be mandated to assist them in creating options. See *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987).

28. The mediator will often be put in a situation of "reality-testing" the parties on the basis of his own prediction of how a court would decide their case. The parties then have an incentive to accept this "determination" of their rights. It is open to question whether this process is superior to a court decision.

MAKING MEDIATION MANDATORY

some other "predictive settlement procedure"²⁹ in certain rights-centered cases, this Article concentrates on the undisputable benefits that mediation can produce in situations that permit interest-based solutions. It therefore proposes a framework for identifying interest-based controversies for mandatory mediation.

B. Power Balance Between the Parties

In cases of considerable power disparities between the parties, mediation is unlikely to be an adequate dispute resolution process unless it can be modified to compensate for the power disparities. The reason mediation is ineffective in these circumstances is that mediation does not emphasize rights (which might empower the weaker party) and has a tendency to preserve power imbalances.³⁰ A good example is domestic violence cases. Family disputes are generally suited to mediation, but they should not be mediated where there is a significant power imbalance between the parties, as in domestic violence cases.³¹

In other cases where power imbalances are significant, mediation may be modified in order to empower the weaker party. One empowerment example is the Minnesota Farmer-Lender Mediation Act,³² which provides debtors free financial analyst and farm advocate assistance in mediations with creditors,³³ most commonly banks.

C. Barriers to Mediation

Mandating mediation is justified only if there are barriers preventing the use of mediation in cases that would benefit from it, and if mandating mediation is the least intrusive measure of overcoming these barriers.

29. McEwen, *supra* note 1, at 78. Other methods of nonbinding ADR such as nonbinding arbitration, summary jury trial or early neutral evaluation (about these methods, see STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION 282-85 (1985), ROGERS & McEWEN, *supra* note 8, at 10) may actually be superior to rights-based mediation in resolving disputes centered around rights. It is important to evaluate the merits of these different methods separately. See Menkel-Meadow, *supra* note 1, at 44.

30. FOLBERG & TAYLOR, *supra* note 1, at 244; CHRISTOPHER W. MOORE, THE MEDIATION PROCESS 30 (1986); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 120 (1983).

31. Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985). Another reason why these cases are usually unsuited to mediation is the importance of sending a clear "message" to other (potential) offenders that violence will be punished and cannot be mediated like any other difference. See A.E. Menard & A.J. Salius, *Judicial Response to Family Violence: The Importance of Message*, 7 MEDIATION L.Q. 293 (1990).

32. MINN. STAT. ANN. §§ 583.20-583.32 (West 1988 & Supp. 1992) (repealed effective July 1, 1993).

33. MINN. STAT. ANN. § 583.26(3) (West 1988 & Supp. 1992) (repealed effective July 1, 1993).

This subsection examines the wide variety of barriers which exist that prevent a more extensive use of mediation.³⁴

1. *Differences in Information and in the Assessment of the Situation*

Often the parties do not have equal information about the facts underlying their dispute or do not share similar assessments of the situation.³⁵ For example, a manufacturing company may not know why sales by a dealer dropped, and may not agree with the dealer's assessment that the product is not priced competitively.

Often, these differences are barriers to a resolution of the dispute,³⁶ but not barriers to entering into mediation.³⁷ In cases where the parties assess the situation differently, making mediation mandatory is not justified by the barrier because the mandate to mediate can only overcome barriers to entering the process. The barriers to come to an agreement are not overcome by a mandate to mediate, unless it creates pressure to settle. Such pressure would be fundamentally incompatible with mediation.³⁸

In some cases, one party may reject mediation because it feels disadvantaged by its lack of information. In these cases, mandating mediation could overcome the barrier. However, other less intrusive measures are probably superior. Instead of forcing a party to go to mediation feeling unprepared, the mediation process could be modified to offer the party additional information, such as from a neutral expert.

2. *A Lack of Interest in a Speedy Resolution of the Dispute*

Sometimes, one of the parties has an interest in dragging its feet on any attempt to resolve the situation (such as a defendant who knows that the plaintiff will probably not be able to sustain protracted litigation). If the status quo is better for that party than any possible litigation or mediation result, that party may pursue a strategy of holding out. This is not just a barrier to mediation, but a much more pervasive problem that

34. For an overview, see GOLDBERG et al., *supra* note 29, at 485-89, 546. Some of the obstacles are discussed in *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265, 267 (Ga. 1989).

35. It should be noted that sometimes different assessments of a situation can also make it easier to agree. If one party thinks that prices will rise and the other one thinks that prices will fall, they may make a fixed price commitment part of an agreement.

36. URY et al., *supra* note 20, at 16.

37. However, one party may not enter mediation because lacking some information it feels at a disadvantage in mediation. In that case, mandating mediation does not solve the problem. Rather, a mediation process should be offered, which allows the party to obtain additional information, such as from a neutral expert.

38. See *supra* part I.

MAKING MEDIATION MANDATORY

cannot adequately be addressed by mandating mediation. Where one party has no incentive to resolve the case, it does not make sense to mandate its participation in mediation, because it will have no interest in making mediation work. This barrier could only be overcome by pressure to settle, which is incompatible with the spirit of mediation.

3. *A Lack of Communication Between the Parties*

Deficient communication can be both a substantive and a procedural obstacle to agreement. If the parties fail to agree on a process which would be beneficial for them because they do not sufficiently communicate before going to court, a duty to mediate can overcome this obstacle. However, there may be less intrusive means to overcome the communication barrier to mediation, such as mandating a mere consultation between the parties about the possibility of using mediation.

4. *Skepticism About Mediation*

The parties and the lawyers advising them may be skeptical about mediation. This barrier may be tackled by education and information about mediation. Mandating this relatively new process, however, is probably not the least intrusive means to spread information about mediation. Instead, a low-intensity duty to mediate, such as the mandatory attendance at an information and screening meeting,³⁹ may be warranted in areas where skepticism about mediation is widespread.

Skepticism can also be present in all of the areas described in Part II.A. In those cases, mandatory mediation is warranted to the extent necessary, provided the controversy is suitable and no significant power imbalances exist.

5. *Lawyers' Self-Interest in an Adversarial Legal Process*

This barrier is qualitatively different from the previous one because it implies that some attorneys will eschew mediation not just because of skepticism, but because of their self-interest, even where it conflicts with the client's interests. This conflict of interest or "agency problem"⁴⁰ may be quite pervasive. The flipside of mediation's potential for reducing legal costs is a threat to lawyers' revenues. Few clients have the

39. In practice, much can depend on how the screening meeting is run. If it is run by the judge who would also decide the case and he strongly suggests mediation for the case, the effect may be the same as a full-fledged duty to try mediation.

40. For a systematic discussion of agency problems, see *PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS* (John W. Pratt & Richard J. Zeckhauser eds., 1985).

information and expertise to judge whether an attorney opposes mediation in the client's or in the attorney's interests. While mandating mediation is the least intrusive means to tackle this agency problem,⁴¹ it is unclear how effectively it can solve it. The answer depends largely on the content and enforcement of the duty to mediate, which will be discussed below.

6. *Fear that Suggesting Mediation Signals Weakness*

In a situation where both parties would like to try mediation but do not suggest it because the other party may read it as a sign of weakness, mandatory mediation may be the best way to break the impasse. Anticipation of this kind of stalemate is often a motivation for mediation clauses.

A related barrier is the fear of destabilizing other relationships by agreeing to an ad hoc mediation in one case. A party that has a number of similar relationships (for example, contractual relationships) might fear that the sudden willingness to mediate a question may be read by its other partners as yielding on the substance of the question, which could turn out to be very costly. Engaging in a mandated or previously agreed-upon mediation does not send this signal. It may thus avoid the drawbacks of a voluntary ad hoc mediation.

IV. WHEN AND HOW TO MANDATE MEDIATION

The three criteria for mandating mediation (type of controversy, power balance, barriers) developed in the previous section can now be applied to the areas where mediation is or may be mandatory. As a result, a framework for assessing when and how to mandate mediation emerges.

A. *When to Mandate Mediation*

Mediation should only be mandated: first, for the appropriate types of controversies; second, only when power imbalances are insignificant or when they can be remedied; and third, only when the mandate is designed to overcome certain barriers to the use of mediation.

41. Another way to solve the agency problem would be to restructure lawyers' incentives so as to eliminate the revenue bias in favor of litigation. However, this seems much more difficult in practice than mandating mediation.

MAKING MEDIATION MANDATORY

1. *Type of Controversy*

Medical malpractice suits involve mainly questions of rights connected to a single encounter. Using the criteria laid out above, they do not constitute an appropriate area for mandatory mediation. The same is true for many small claims. A general requirement of mediation for all cases below a certain dollar value is therefore inappropriate as well. A rule that allows the screening and referral to mandatory mediation of all the cases below a certain value is at least arbitrary. It risks mandating mediation in many cases that are inappropriate because careful screening may be too costly and because the court's incentives are tilted towards referral. Finally, civil rights cases are appropriate for mediation if their focus is on an ongoing relationship rather than the respective rights from a one-time situation.

On the other hand, family and labor relations, distribution, construction, lease, long-term energy and credit contracts, and partnerships are areas that possess these characteristics and are particularly suited for mediation. In cases where the contract contains a mediation clause, a strong presumption exists that the area is suited to mediation because the parties will probably only provide for mandatory mediation if they expect to benefit from it.⁴² Legislators and courts may have more diverse incentives to mandate mediation, which may not always square with the interests of the parties, such as the desire to reduce courts' backlog of cases.

2. *Power Balance*

Cases of domestic violence in families and most instances of race or sex discrimination in an institutional setting⁴³ are examples of power imbalances that should caution against mandating mediation in these contexts. The power imbalances go beyond differences in economic resources and access to information, and are difficult to address by adapting the mediation process to support the disadvantaged side. Additionally, it may be in the public interest to address extremely "imbalanced" disputes with a strong judicial "message."⁴⁴

The superior power of a bank-mortgagee over a farmer-mortgagor

42. However, there may be other less desirable reasons for including a mediation clause in a contract. One may be that the stronger party has pressured the weaker party into the acceptance of such a clause because it believes that its superior power will enable it to use mediation to its advantage. This problem has to do with power imbalances and will be addressed in the next subsection.

43. See Silver, *supra* note 14, at 590. Additionally, civil rights cases will often suffer from power imbalances which make them unsuited to mediation.

44. See Menard & Salus, *supra* note 31 and accompanying text.

or the power imbalance between a consumer and a producer when it comes to product warranty, however, can be counterbalanced by adding features to the mediation process. Mandatory mediation can be appropriate if these mechanisms are put in place that provide the weaker side with informational or economic support or other means to redress the imbalance.⁴⁵ Many of the existing legal provisions for mandatory mediations do this. Empirical research should be conducted to monitor how effective these mechanisms are in redressing the power imbalances.

Mediation clauses present a special problem in this area. There cannot be an automatic presumption that the parties will take care of power imbalances. A mediation clause may be an instrument the more powerful party uses to sanction an unfettered exercise of its power in any controversy. Clauses mandating mediation in consumer contracts or dealership agreements, especially in contracts of adhesion should be subject to close scrutiny.⁴⁶ The more comprehensive the mediation effort such clauses require,⁴⁷ the more important it will be that they provide some mechanism to redress the power imbalance.

3. Barriers to Mediation

As examined earlier, four of the different possible barriers to mediation may warrant mandating mediation: 1) a lack of communication between the parties about a process to resolve the dispute, 2) skepticism about mediation, 3) the fear that suggesting mediation may signal weakness, and 4) the self-interest of lawyers in not using mediation. This subsection examines in which of the current areas of mandatory mediation described in Part II these barriers are likely to be present, thus warranting

45. Counseling can help complainants in civil rights cases. See Silver, *supra* note 14, at 591. Another means can be to allow the other side to organize for the purpose of these controversies, such as in labor negotiations and mediations. See GOLDBERG et al., *supra* note 29, at 498. The problem will often be that no such organization exists at the time when mandating mediation is contemplated. A solution may be to phase in mandatory mediation slowly and allow an organization to grow with it.

46. Mediation clauses in contracts of adhesion have routinely been upheld in disputes involving automobile dealerships by the courts of this land. See DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326 (7th Cir. 1987) (mediation clause in a contract of adhesion upheld against an unconscionability challenge); Saturn Distribution Corp. v. Williams, 905 F.2d 719 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 516 (1990) (upholding a mediation clause against a Virginia law prohibiting automobile manufacturers and dealers from entering into an agreement that contained mandatory alternative dispute resolution provisions such as Saturn's by holding Virginia law conflicted with the Federal Arbitration Act, 9 U.S.C. § 2 (1988) and was preempted by the Supremacy Clause, U.S. CONST. art. VI).

As a general matter, the analysis of the validity of a mediation clause should not be automatically the same as for an arbitration clause, because a mediator does not dispose of the same leverage to redress imbalances as an arbitrator.

47. See *infra* part IV.B about the different possible intensities of a duty to mediate.

MAKING MEDIATION MANDATORY

the mandates imposed.

The first three barriers (lack of communication, skepticism, fear of signalling weakness) can all be present in all of the areas described in Part II. Mandating mediation is warranted to the extent necessary to overcome these barriers if the other two criteria (type of controversy, power imbalance) are satisfied.

The third barrier, fear of suggesting mediation, may be especially strong in areas where voluntary ad hoc mediation of an individual controversy may send a signal of weakness which destabilizes other relationships. Areas where one side tends to have many similar relationships which might be affected are labor contracts, distributorships, consumer warranties and mortgage foreclosures. Mandating mediation can avoid some of the negative spillovers which an ad hoc decision for mediation may create. Engaging in a mandated or previously agreed-upon mediation does not send this signal.

The fourth barrier, lawyers' self-interest in not using mediation, will be particularly present in areas that have potential for protracted high stakes litigation, generating high fees. Large construction and dealership contracts are examples. Some forms of shareholder litigation⁴⁸ and medical malpractice cases would be further examples. However, as discussed earlier,⁴⁹ these areas are not well-suited to mediation and the mere presence of a barrier to mediation does not warrant mandating mediation. In some other areas, like mortgage foreclosures or consumer warranties ("lemon" cases), where lawyers' fees tend to be low, lawyers' interests will not be a barrier at all.

Different areas have different barriers to mediation. The most important barriers that warrant mandating mediation (lack of communication, skepticism, fear of signalling weakness, and lawyers' self-interest) are not present in all areas. This implies that in some areas, such as distributorship contracts, mandating mediation is more justified than in other areas, such as in small diverse contracts or low stakes civil rights controversies.

B. How to Mandate Mediation

Where mandating mediation is justified according to the criteria laid

48. For example, shareholders' derivative suits, where the shareholder seeks to enforce a right of the corporation against its officers and directors. Lawyers are often the driving force behind these suits, acting as "private attorney generals," even though their personal motivation is private gain, not public (or other shareholders') welfare. See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

49. See *supra* part IV.A.

out above, legislators, courts or parties still face the question of how best to mandate it. This question can be divided into three parts: first, how should the duty to participate be established - by a general rule or by a rule that gives the courts the power to mandate mediation, or by individual mediation clauses; second, what should be the content of the duty; and third, how should this duty be enforced.

In answering these questions, the principle of proportionality should be applied: the range of actions mandated and the sanctions inflicted to enforce the duty should be proportional to the barriers to mediation that have to be overcome in the concrete type of relationship.⁵⁰

1. *Creation of the Duty*

At least three different ways to establish a duty to mediate exist: by a general rule (statute or court rule), by individual referral (by a court), or by a contractual mediation clause. This subsection examines the advantages and disadvantages of each method.

One way to create a duty to mediate is to have the parties draft a *mediation clause* that specifies from the outset the procedure for addressing controversies that may arise. A mediation clause is the most desirable way because it allows tailoring the solution to the individual relationship without creating the delay and uncertainty associated with an individual evaluation by a court after a dispute has been brought there. However, parties may not consider mediation clauses because they do not take into account the possibility of disputes when drafting the contract, or because barriers already prevent the inclusion of a mediation clause in the contract.

The second best method is to create the duty to mediate by a *general rule* that applies, for example, to all relationships in a certain area such as leases or farm mortgages. The advantage of a general rule over an open rule that allows case-by-case referral by the court is that the parties know in advance that they are required to mediate. This knowledge will probably affect the way parties conduct their controversies even before going to court, and may decrease the overall level of adversarial behavior in the relationship. The only drawback of a general rule is that it cannot fit all cases equally well without losing its clarity. To soften the rigidity of a general rule, parties could be allowed to

50. There are many justifications for the application of the principle of proportionality in this instance. One is that besides the unwarranted barriers to mediation there may be valid reasons for a party not to try mediation. Any "overkill" in the duty to participate in mediation unnecessarily increases the risk of weeding out valid reasons like the desire to establish a precedent quickly or avoid the costs of mediation.

MAKING MEDIATION MANDATORY

jointly⁵¹ "opt out" of the mandated mediation before it has started. A statute can allow opting out either at the beginning of the relationship (for example, by deferring to a clause in the contract permitting opt outs), or when the dispute has arisen. Allowing the parties to opt out when a dispute arises has the disadvantage that some of the old barriers to ad hoc mediation may reappear: skepticism, fear of showing weakness and lawyers' interests may lead to opting out once a dispute has arisen. Given these barriers and the already restrictive criteria proposed here for mandating mediation by a general rule, only opting out at the beginning of the relationship should be provided. This rule would essentially declare valid "negative" mediation clauses and might be a good way to stimulate active consideration of the role of mediation by the parties early on in their relationship. However, it might also allow lawyers' interests and skepticism to stymie mediation from the outset. Opt out features can thus soften a general rule, but at a cost. The necessity of opt out features is questionable because, as will be shown below, a general rule does not have to sacrifice the principle of proportionality.

Finally, a third way to create a duty to mediate is by *individual evaluation* of each dispute to determine whether there is a duty to mediate and how far it goes. This is the least preferable solution because it creates more uncertainty before the parties go to court and resolves such uncertainty only late in the dispute. The advantage of an individual evaluation is that an experienced neutral, the judge, can adjust the duty to the circumstances of the case. This is necessary in areas where there is a substantial risk of power imbalances that are not counterbalanced by the design of the process. The screening can at the same time be used to screen out cases in which even voluntary mediation may be undesirable. Domestic violence in family disputes is an example where individual screening of cases may be the only solution.⁵²

Individual evaluation, although it compromises the effectiveness of the duty to mediate, would perhaps always be the best guarantee for an adequate, proportional duty in each case. However, *proportionality* does not mean that in each case the costs of mediation have to be compared with the potential benefits in order to determine the duty to mediate. Such a case-by-case analysis would make it impossible for the parties to know with some certainty what their duties are. The resulting uncertainty would defeat the whole purpose of mandatory mediation by opening up another field of controversy and perhaps even spawning "satellite

51. A *unilateral* opt out possibility is equivalent to not having a duty because the refusal to mediate, then, has to be understood as an opting out.

52. This is suggested by Rowe, *supra* note 31, at 905.

litigation.⁵³ The proportionality analysis proposed here should be applied by legislators or policymakers to guide them how and when to mandate mediation by general rules for certain *types* of cases.⁵⁴ It should also be applied by parties who contemplate drafting a mediation clause.

2. *Content of the Duty*

The duty to mediate can encompass four different forms of action: 1) attendance at a screening session, 2) presence at the mediation session, 3) provision of information, and 4) a good faith effort to resolve the controversy through the mediation.

Attendance at a screening session in which information about mediation is given and in which cases are screened for their potential for mediation is a very low-intensity duty. It may not even be called "mandatory mediation," because no mediation effort is made at the screening session. However, the screening session can serve to overcome some barriers to mediation such as a prior lack of communication between the parties or skepticism of mediation, thus becoming a mandatory first step that may lead to a voluntary participation in mediation. This low-intensity duty has the advantage of keeping the duty to mediate proportional to barriers which are not very serious or can be overcome by means other than mandating mediation.⁵⁵

The *presence* of both sides at the mediation session is a prerequisite for any mediation effort. However, even this basic requirement is open to interpretation. It can mean that the parties need only send a representative to the mediation session. This will probably be sufficient to overcome the barrier constituted by mutual fear of signalling weakness. It can also be understood to require that the representatives have full settlement authority in all questions relating to the controversy so that they can meaningfully participate in the process of give and take that characterizes most successful mediations.⁵⁶ Parties may send someone without full authority because they fear showing weakness by committing to the process or fear signalling a readiness to compromise to

53. This danger is emphasized by ROGERS & MCEWEN, *supra* note 8, at 48.

54. See *infra* part IV.C for an illustration of this approach.

55. See *supra* parts III.C.1-2.

56. In practice, the presence of an agent with settlement authority on each side is very important. Courts have required participation of the parties themselves or of representatives with settlement authority in mediation. See *Semiconductors, Inc. v. Golasa*, 525 So. 2d (Fla. Ct. App. 1988). Courts have also required participation of someone with settlement authority in ADR efforts at pretrial conferences. See *Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc). Finally, courts have required attendance of a person with settlement authority in court-annexed arbitration. See *Gilling v. Eastern Airlines, Inc.*, 680 F. Supp. 169 (D.N.J. 1988).

MAKING MEDIATION MANDATORY

constituencies.⁵⁷ Where strong fear of weakness or constituency barriers are present, this more demanding interpretation of the presence requirement may thus be warranted. Another, less benign motivation for sending an agent without settlement authority is to be able to renege on whatever tentative agreement has been reached in mediation in order to extract more concessions in a subsequent round of negotiations.⁵⁸ Requiring settlement authority guards against such strategies.

Finally, presence can be understood to mean presence of the parties in person.⁵⁹ The discussion of the dispute among the principals themselves generally makes mediation much more effective because it puts the real parties in charge of their dispute. Party presence may be required where the countervailing self-interest of lawyers constitutes a barrier to mediation and thus the lawyers' presence at the table is not sufficient to give mediation a fair chance.

Beyond presence, the *provision of information* during the mediation may be required. Information on the parties' real interests or on the cost of certain concessions to a party often plays an important role in a mediation. Parties may be required to disclose information to the mediator only in confidential caucuses or to the other party as well. Parties may not disclose information, even to the mediator, because they fear indirectly giving the other parties hints about the strength of their own position. If both parties have this fear, it is an "inferior equilibrium" or logjam, very similar to the fear to appear weak. It is a barrier to mediation that should be overcome. However, there may be other valid reasons not to provide information, including the cost of the information and the intention to use proprietary information as leverage in the negotiations.⁶⁰ In the latter case, information can influence the power balance between the parties. Requiring more than answers to the most basic questions of the mediator in private caucus would therefore risk substantial costs with relatively little justification. A flexible rule which would only allow withholding information that would be protected from pretrial discovery⁶¹ would suffer from difficulties of interpretation and administration, thus inviting satellite disputes and thereby increasing rather

57. Other possible explanations include cost considerations. The opportunity cost of spending time in mediation may be higher for the type of person who can be entrusted with the necessary settlement authority than for a person who just makes nonbinding proposals. This will be especially likely in larger organizations.

58. DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 307 (1986).

59. See *Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc); *Gilling v. Eastern Airlines, Inc.*, 680 F. Supp. 169 (D.N.J. 1988) (judicial discussion of this requirement in other ADR contexts).

60. The latter, however, would not be a reason against disclosure only to the mediator.

61. See Note, *supra* note 6, at 1097.

than reducing controversy. However, in cases of power imbalance a general, more far-reaching disclosure requirement directed at the more powerful party may be part of the mechanism designed to adjust the power balance.⁶² Parties may design greater disclosure duties in mediation clauses that specifically address the provision of information.⁶³

Finally, the duty to mediate can require parties to make a *good faith effort* to resolve the controversy through mediation.⁶⁴ The danger of this broad formulation of the duty to participate is that it may create settlement pressures, cutting back on the essential voluntariness of agreement in mediation.⁶⁵ The broad interpretation is only warranted where intense barriers to mediation exist that are likely to stop the parties from participating in the mediation process, even when they are present at the mediation session. An example would be a situation where one party fears that participating in mediation would destabilize a lot of other relationships.⁶⁶ Even then, "good faith effort" should only be understood to exclude total stonewalling⁶⁷ in the mediation, because otherwise it will become indistinguishable from a pressure to settle.

At all four levels, the intensity of the duty to mediate can be managed effectively by providing *time limits* for the mediation process. Court orders or mediation clauses may set an overall time limit for the mediation process as well as time limits within which a party has to respond to proposals or provide information. If mandatory mediation is expedited by time limits and only involves a low time commitment, it is much less burdensome than if a substantial waiting period is imposed on other legal remedies in order to give mediation efforts time to work out.⁶⁸ Time limits are thus additional instruments for fine-tuning the duty to mediate.

62. An example for this is the Minnesota Mortgage Moratorium Mediation, see MINN. STAT. ANN. § 583.26 (West 1988 & Supp. 1992) (repealed effective July 1, 1993), discussed in more detail *infra*, part IV.B.3.

63. See, e.g., AMF, Inc. v. Brunswick Corp., 621 F. Supp. 456 (E.D.N.Y. 1985). In this case, it is very likely that the parties foresaw the logjam and wanted to avoid it.

64. See James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This The End of "Good Mediation?"* 19 FLA. ST. U. L. REV. 48, 63 (1991) (a recent empirical study of mandatory court-annexed mediation in Florida suggesting that a majority of attorneys and mediators "believed that the problem of the nonplaying party is best addressed by imposing a mediation-in-good-faith requirement").

65. This danger is emphasized by ROGERS & MCEWEN, *supra* note 8, at 59.

66. See Obermoller v. Federal Land Bank of Saint Paul, 409 N.W.2d 229 (Minn. Ct. App. 1987) (bank feared that mediation statute might force it to mediate in many other situations as well).

67. See Graham v. Baker, 447 N.W.2d 397 (Iowa 1989) (a narrow interpretation of "participation" which practically tolerates "stonewalling").

68. See Department of Transp. v. City of Atlanta, 380 S.E.2d 265 (Ga. 1989).

MAKING MEDIATION MANDATORY

3. *Enforcement of the Duty*

The enforcement of the duty to participate in mediation has to strike a balance between reaching efficiency and guarding proportionality. Efficiency in enforcing mandatory mediation depends primarily on the deterring effect of the sanction. To avoid spawning satellite litigation, the sanction should be visible and credible enough to prompt compliance without court intervention. Proportionality requires, however, refraining from "overkill" in sanction enforcement and guarding against settlement pressures.

If the content of the duty to mediate is broadly defined and a party does not comply, such as by not furnishing information, the costs of the unsuccessful mediation effort might be imposed on that party. This would be a proportional sanction because it only shifts the costs incurred in the process of the mediation to the party that has defeated the purpose of the mediation.

If the duty to mediate includes a "good faith effort" to settle the case, the transmission of a mediator's report to the court may be considered a good sanction because the court could infer from it whether a party "unreasonably" rejected proposals, thus not acting in good faith. However, this type of sanction would violate the confidentiality of mediation, clearly create substantial settlement pressures, and would therefore be disproportional to the aim of getting parties to participate in mediation.⁶⁹

In the case of an outright refusal to mediate, no mediation takes place and the costs incurred may be low. In that case, shifting the costs of the mediation will not be an effective sanction. However, shifting instead the costs of the subsequent trial to the person who refused mediation would not be proportional, since even a good faith mediation does not necessarily result in a settlement of the case.⁷⁰ Therefore, in cases of outright refusal to mediate, different levers have to be used as sanctions, depending on the position of the party. The party who has an interest in changing something in the relationship (the movant)⁷¹ can be denied access to another forum (the courts, arbitration) to bring the request for change. This is the lever most existing mandatory mediation

69. See SPIDR REP., *supra* note 4, at 16.

70. Here, it is again important to realize that mandatory mediation does not imply a pressure to settle.

71. This expression is used in a nontechnical sense here, to indicate the party who is interested in changing the status quo and who would be the plaintiff in a court action.

provisions and the courts rely on:⁷² the court action of a plaintiff is dismissed or stayed if he did not comply with mandatory mediation. A less stringent variation on this sanction is to delay the movant's access to legal remedies. This route is taken by the Minnesota Farmer-Lender Mediation Act.⁷³

The party who is approached by the movant and who has an interest in maintaining the status quo (the respondent) is more difficult to sanction adequately upon refusal to mediate, because many standard sanctions are not available. Obviously, delaying the availability of other remedies would favor this party. Giving the mediator the power to proceed without the party and have the result be binding (like in arbitration) is not possible either, because of the nature of mediation.⁷⁴ Assessing damages is not practicable because, given the fact that settlement is not required, the benefit the movant would have had from the respondent's participation in the mediation cannot be quantified. Particularly, it cannot be assumed that mediation would have avoided litigation. The only quantifiable damages are the probable negligible cost and delay the movant incurred trying to persuade the respondent to participate in mediation. This leaves as remedies against the respondent specific performance or deprivation of some other legal advantage upon refusal to mediate.⁷⁵ Specific performance has been chosen by a federal district court in a case of mandatory nonbinding arbitration.⁷⁶ The Farmer-Lender Mediation Acts in Minnesota and Iowa deprive the respondent of the advantage of a mortgage moratorium upon failure to participate in good faith in the mediation.⁷⁷ However, both remedies have problems. Specific performance is not very practicable and, therefore, will often not be a

72. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987); *Haertl Wolff Parker, Inc. v. Howard S. Wright Constr. Co.*, 1989 U.S. Dist. LEXIS 14756 (D.C. Or. 1989); *Production Credit Association of Worthington v. Spring Water Dairy Farm*, 407 N.W.2d 88 (Minn. 1987); *Obermoller v. Federal Land Bank of Saint Paul*, 409 N.W.2d 229 (Minn. Ct. App. 1987).

73. MINN. STAT. ANN. § 583.27, subd. 3 (West 1988 & Supp. 1992) (repealed effective July 1, 1993).

74. The Minnesota mortgage mediation statute, however, contains a provision according to which the result of a mediation can become binding on other creditors if they do not attend the mediation session or object according to a certain procedure, MINN. STAT. ANN. § 583.28, subd. 1 (West 1988 & Supp. 1992).

75. Another alternative is only to "order" the respondent/defendant to mediate but not to provide any sanction. *See Department of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989).

76. *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985).

77. MINN. STAT. ANN. § 583.27, subd. 4 (b) (West 1988 & Supp. 1992) (repealed effective July 1, 1993); *Bank of Craig v. Hughes*, 398 N.W.2d 216, 218 (Iowa Ct. App. 1986).

MAKING MEDIATION MANDATORY

credible sanction.⁷⁸ Taking away substantive legal rights from the addressee for failure to participate in mediation risks violating proportionality. Nevertheless, a carefully conceived sanction in terms of legal disadvantages is probably the best way to enforce mandatory mediation against a recalcitrant respondent. The chance to engineer this sanction is greatest in mediation clauses. They can take into account the specific interests of the parties to the contract and the incentive effects that can be drawn from them.

Finally, the efficiency of any of these sanctions can be greatly enhanced by providing a practicable implementation mechanism and by spelling out duty and sanction as early and as clearly as possible. The credibility of the sanction can be enhanced by designing a practicable administration of it. The Minnesota Farmer-Lender Mediation Act requires the mediator to determine whether a party has not "participated in mediation in good faith." The courts have been extremely reluctant to overturn the mediator's findings in this respect, particularly since there are no records of the mediation proceedings.⁷⁹ The advantage of this mechanism is that it makes the sanction of bad faith more credible. The danger is that it lends substantial power to the mediator which may be abused for settlement pressure. Another possibility is, to leave it to the opposing party to claim the lack of good faith and have a judge decide about the allegation.⁸⁰

Compliance with mandatory mediation can be enhanced regardless of the enforcement mechanism by announcing it early and spelling out its implications clearly.⁸¹ Ideally, the parties are aware of mediation as the forum for resolving their controversies throughout the relationship. Mediation clauses and legal provisions can best spell out the specifics of the mandatory mediation in advance if they are tailored to a specific relationship. The parties will also know earlier about their duty to mediate if the duty is already part of their legal relationship than if it is part of the court's case administration.

78. However, specific performance has been deemed not "a vain order" in the case of submitting a dispute to nonbinding arbitration. *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 463 (E.D.N.Y. 1985).

79. *Production Credit Ass'n of Worthington v. Spring Water Dairy Farm, Inc.*, 407 N.W.2d 88 (Minn. 1987); *Obermoller v. Federal Land Bank of Saint Paul*, 409 N.W.2d 229 (Minn. Ct. App. 1987).

80. For a discussion of the different possibilities for implementing a good-faith requirement see Alfani, *supra* note 64, at 63-66.

81. A mediation clause should, for example, try to provide as much concrete guidance in the event of a controversy as possible. See John H. Wilkinson, *Contract Clauses for Nonbinding ADR*, in DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 267, 271 (John H. Wilkinson, ed. 1990).

C. Model Mediation Statute and Clause

The following mediation statute and clause may illustrate the use of the criteria for mandatory mediation laid out in this Article.

1. Mediation Statute

As for the statute, a brief analysis of an already existing mediation statute that conforms to the criteria developed in this Article may be more useful than abstractly developing a model mediation statute here. Therefore, this subsection will analyze the Minnesota Farmer-Lender Mediation Act (Act) which provides for mandatory mediation proceedings if a bank wants to foreclose on an agricultural property.⁸²

The type of dispute the Act covers is amenable to interest-based mediation. The attempt to adjust the terms of a loan occurs within a long-term relationship where the parties, the bank-creditor and the farmer-debtor, have a continuing interest in working together. The aim of the mediation is to try to reach an interest-based debt restructuring before seizing the property.

The power imbalance that exists between the parties is acknowledged and counterbalancing provisions are included in the law. The bank which professionally deals with debt restructurings will have more access to information and to the necessary skills to influence a restructuring in its favor. To put the farmer who will lack skills and information to match the bank's on a more equal footing, the law provides for a financial analyst to meet with the debtor and for a farm advocate to assist the debtor free of charge in the proceedings.

The barriers to mediation that are likely to exist in this area are the bank's fear of creating a precedent of giving in to a debtor in difficulties which may jeopardize other similar credit relationships. On the farmer's side, a lack of information and fear of the power imbalance are likely barriers to mediation. The law addresses these barriers with the mandatory mediation requirement.

The creation of the duty through a general rule applicable to all cases in this specific area is the optimal choice as long as the loan contracts themselves do not provide for mediation. The content of the duty is spelled out in detail in the Act. The duty to mediate is intensive by the standards developed in this Article, since it includes not only the duty to be present at the mediation session and to provide extensive

82. MINN. STAT. ANN. §§ 583.26-583.28 (West 1988 & Supp. 1992) (repealed effective July 1, 1993). See also Robert M. Lawless, Note, *The American Response to Farm Crises: Procedural Debtor Relief*, 1988 U. ILL. L. REV. 1037 (a critical economic assessment of the statute).

MAKING MEDIATION MANDATORY

information,⁸³ but also a duty to "engage in mediation in good faith."⁸⁴ However, the content of the good faith requirement is for the most part spelled out in detail which limits its scope.⁸⁵ Likewise, the intensity of the duty is allayed by the strict and detailed timetable that is imposed by the law:⁸⁶ the debtor must request mediation within fourteen days after learning of the creditor's desire to foreclose,⁸⁷ the mediation must be scheduled in a notice by the director of the mediation program to all creditors within ten days,⁸⁸ and the initial mediation meeting must then be held within twenty days of the notice.⁸⁹ The whole proceeding regularly⁹⁰ cannot take more than 90 days from the debtor's request for mediation.⁹¹

Finally, the Act's enforcement of the duty to mediate is also consistent with the proposals made in this Article. If the creditor (who is

83. The creditor "must provide the debtor . . . with copies of notes and contracts for debts subject to the farmer-lender mediation act and provide a statement of interest rates on the debts, delinquent payments, unpaid principal balance, a list of all collateral securing debts, a creditor's estimate of the value of the collateral, and debt restructuring programs available by the creditor." MINN. STAT. ANN. § 583.26 subd. 5(d) (West 1988 & Supp. 1992).

84. MINN. STAT. ANN. § 583.27 (West 1988 & Supp. 1992) (repealed effective July 1, 1993).

85. MINN. STAT. ANN. § 583.27 (West 1988) (repealed effective July 1, 1993) subd. 1(a) provides:

The parties must engage in mediation in good faith. Not participating in good faith includes: (1) a failure on a regular or continuing basis to attend and participate in mediation sessions without cause; (2) failure to provide full information regarding the financial obligations of the parties and other creditors . . . (3) failure of the creditor to designate a representative to participate in the mediation with authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter; (4) lack of a written statement of debt restructuring alternatives and a statement of reasons why alternatives are unacceptable to one of the parties; (5) failure of a creditor to release funds from the sale of farm products to the debtor for necessary living and farm operating expenses; or (6) other similar behavior which evidences lack of good faith by the party. . . .

It is doubtful, whether the sweeping subclause (6) is still necessary after the more detailed specifications of the subclauses (1)-(5). In any event, it should be interpreted narrowly, because the barriers to mediation in this area would probably not warrant an even more intensive duty to mediate.

86. MINN. STAT. ANN. § 583.26 subd. 2(a), 3(a), 4(a), 4(c), 8 (West 1988) (repealed effective July 1, 1993).

87. MINN. STAT. ANN. § 583.26 subd. 2(a) (West 1988) (repealed effective July 1, 1993).

88. MINN. STAT. ANN. § 583.26 subd. 4(a) (West 1988) (repealed effective July 1, 1993).

89. MINN. STAT. ANN. § 583.26 subd. 4(c) (West 1988) (repealed effective July 1, 1993).

90. Exceptions apply when one of the parties has not participated in good faith in the mediation, MINN. STAT. ANN. § 583.26 subd. 5(e) and § 583.27 (West 1988 & Supp. 1992) (repealed effective July 1, 1993). These exceptions are in fact sanctions of the failure to participate in good faith.

91. MINN. STAT. ANN. § 583.26 subd. 5(a) (West 1988 & Supp. 1992) (repealed effective July 1, 1993).

the movant in these cases) fails to participate in good faith in the mediation, he has to pay the debtor's costs and attorney's fees for the mediation and his remedies can be suspended for an additional period of 180 days.⁹² If the debtor does not participate in the mediation or if his participation lacks good faith, the creditor can pursue his other remedies, namely seizing the property without further delay.⁹³

2. Mediation Clause

The criteria proposed here can also be applied to design a mandatory mediation clause. The following model clause⁹⁴ for a franchise agreement may serve as an example:

§ 1 (a) The parties agree to submit all disputes arising between them in connection with this franchise agreement to mediation before pursuing other remedies.⁹⁵

(b) Any party can initiate the mediation process by notifying the other party of the disputed issue it wishes to submit to mediation.

§ 2 The parties will jointly appoint a mediator from the list of eligible mediators.⁹⁶ If within [20] days of the mediation request the parties cannot agree on a mediator, the [neutral from industry association or the American Arbitration Association or the Center for Public Resources] will appoint a mediator.

§ 3 (a) Representatives of the parties who have authority to settle the dispute will attend any mediation sessions the mediator schedules within 30 days of his appointment. However, such sessions shall not exceed a total of [20] hours.

(b) The franchisor will provide any information requested by the franchisee during the mediation about arrangements made with other franchisees on the issues under dispute.

(c) During the mediation, franchisor and franchisee will continue to fulfill all their obligations under the contract and not discontinue or reduce deliveries and routine information exchanges.

92. MINN. STAT. ANN. § 583.27 subd. 3 (West 1988) (repealed effective July 1, 1993).

93. MINN. STAT. ANN. § 583.27 subd. 4 (West 1988) (repealed effective July 1, 1993).

94. The model clause here is intended to serve as an illustration only and kept as short as possible. To provide more guidance for the mediation process, a more detailed clause may be advisable.

95. The clause can also provide for negotiation as a first step before a mediation procedure is initiated. See Wilkinson, *supra* note 81, at 270.

96. Such a list would be established by representatives of the franchisor and the franchisees.

MAKING MEDIATION MANDATORY

§ 4 (a) If the party who has requested mediation does not participate in the mediation or otherwise does not conform to the provisions laid out in this mediation agreement, it is barred from initiating litigation or pursuing other remedies for a period of [90] days. During this period it has to continue to fulfill all its obligations under the franchise contract. It also has to bear the mediator's fees.

(b) If the party who has received a request to try mediation does not participate in the mediation or otherwise does not conform to the provisions laid out in this mediation agreement, it will have to bear the full costs of the mediation, including the mediator's fees and the other side's expenses.

§ 5 If the mediation fails to lead to an agreement of the parties to settle the dispute within the period specified in § 3 (a), both parties are free to pursue other remedies.⁹⁷ Unless provided otherwise in § 4, each party will bear its costs and the mediator's fees will be borne equally by both parties.

The type of dispute subject to the clause, disagreements which arise under a complex contract with considerable duration, is amenable to interest-based mediation. Further, the creation of the duty by a clause is the best way to introduce mandatory mediation in a contractual relationship.

It is assumed here, that the franchisor has resources that significantly exceed those of the franchisee, which leads to a power imbalance between the parties. To redress this imbalance, the clause asymmetrically requires the franchisor to disclose important information (§ 3) and to continue dealing with the franchisee during the mediation (§ 3).

Several barriers to mediation in this area justify drafting a mandatory rather than an optional mediation clause. On the franchisor's side, it is the fear to be seen as caving in to a franchisee's pressure which might make the relationships with many other franchisees more difficult. On the franchisee's side, it is a lack of information and a likely power imbalance which may create a reluctance to mediate. If antitrust-related arguments play a role in the dispute, the franchisee's lawyers may also have incentives not to use mediation, because litigation may financially be more attractive for them.

The content of the duty is relatively intensive, especially the information requirements for the franchisor. However, there is no general "good faith participation" requirement because the barriers to mediation in this area do not seem to warrant such a sweeping duty. A tight timetable limits the intensity of the duty to mediate by holding the potential delay

97. A clause can also provide for binding arbitration in this instance.

within predictable bounds.

The enforcement of the duty seeks to strike a balance between effectiveness and proportionality. The sanctions build on the plaintiff's interest to find a remedy quickly and the defendant's interest in avoiding cost⁹⁸ and gaining time.

V. CONCLUSION

Before mandating mediation, the legislators, judges, or parties who contemplate it should analyze the type of controversy concerned, check for significant power imbalances and clarify which barriers to mediation they want to overcome. It will not always be possible to discover all potential power imbalances and barriers to mediation on a general level. However, the analysis performed will yield a better basis for mandating mediation than considerations of just a single dimension, such as the backlog of court cases. If this initial analysis indicates mandatory mediation is warranted; legislators, judges, or parties should tailor the content of the duty (presence, information, or good faith participation) to the barriers they have identified. Finally, they should design sanctions that are efficient and proportional, taking into account the different positions of the parties.

Investigating different types of controversies has shown that mandatory mediation is appropriate in cases where the parties have an ongoing relationship, often on a contractual or institutional basis. This pattern suggests that mandates to mediate should be rooted in the legal and institutional structures of specific relationships rather than in the general framework of a court's procedural rules, applicable to all disputes brought before it. The court's procedural rules may extend only as far as informing parties about mediation at a screening session without, however, imposing mediation.⁹⁹

The findings about the specific content and the enforcement of the duty to mediate point in the same direction: both are highly dependent on the specific relationship and there are advantages to specifying them early. In the context of a relationship, duties to mediate can be understood as a substantive mutual obligation of the parties rather than as a procedural

98. Rogers and McEwen even propose to include liquidated damages in mediation clauses as an incentive to comply. See ROGERS & MCEWEN, *supra* note 8, at 68.

99. See *supra* part IV.B.2.

MAKING MEDIATION MANDATORY

requirement imposed by the courts or legislatures.¹⁰⁰ This perspective suggests that parties should be enabled to devise and change¹⁰¹ duties to mediate. This conclusion supports an incorporation of mandatory mediation into the parties' handling of disputes before they even reach the courts.¹⁰² As a result, duties to mediate would have a better chance to change the way controversies are resolved before they reach the courts.

100. However, the Supreme Court of Iowa held that "[t]he duty [to mediate] is purely procedural. Mediation is only an additional procedural step in the foreclosure process, and not an alteration of substantive rights." *First Nat'l Bank in Lenox v. Heimke*, 407 N.W.2d 344 (Iowa 1987). But this assessment has no basis in the language and design of the statute and is probably motivated by narrow considerations to uphold the retroactive applicability that was intended by the legislature.

101. See *supra* part IV.B.1 about the modification or opting out of general mediation duties through "negative" clauses. These would be hard to imagine in the case of court-imposed procedural requirements.

102. See *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 462 (E.D.N.Y. 1985) (emphasizing the benefits of the "self-regulatory system" the nonbinding arbitration instituted and held it was enforceable).

